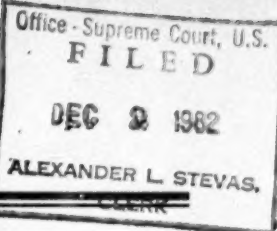


82 -928



No. _____

In The
Supreme Court of the United States

October Term 1982

ALTON BASKERVILLE,

Petitioner,

v.

CHARLES SYLVESTER STAMPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
JUDGMENT OF THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is Exhaustion Of State Remedies Required Under *Rose v. Lundy*, 50 U.S.L.W. 4272 (U.S. March 3, 1982) Where The State Has Waived That Defense?

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**In The
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No. _____

ALTON BASKERVILLE,

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CHARLES SYLVESTER STAMPER,

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**PETITION FOR WRIT OF CERTIORARI TO THE
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OF APPEALS FOR THE FOURTH CIRCUIT**

OPINIONS BELOW

The opinion of the Court of Appeals from which certiorari is sought is an unreported order dated October 4, 1982, and is included herein as Appendix A. The opinion of the District Court is reported in 531 F.Supp. 1122 (E.D. Va. 1982).

JURISDICTION

The opinion of the Court of Appeals was handed down on October 4, 1982. The jurisdiction of this Court to issue the writ of certiorari in this case is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 17, 1979, Charles Sylvester Stamper was convicted *inter alia* of three charges of capital murder and sentenced to death in the electric chair. Stamper appealed these convictions to the Virginia Supreme Court by way of direct appeal which was affirmed by written opinion at 220 Va. 260, 267 S.E.2d 808 (1979).

Stamper then filed a petition for a writ of habeas corpus in the Circuit Court of Henrico County which was denied by an order dated November 4, 1980. The Virginia Supreme Court denied the appeal of this petition by an order dated November 20, 1981 (Record No. 81-0359).

Thereafter Stamper filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia on January 19, 1982. The original petition contained only those allegations which had been presented to the Virginia courts. The Court appointed separate counsel to investigate possible claims of ineffective assistance of counsel, and an amended petition for a writ of habeas corpus was thereafter filed, raising allegations of ineffective assistance of counsel. A motion to dismiss the unexhausted claims was filed by your Petitioner but was denied by the Court. On February 5, 1982, a plenary hearing was held on the issues of ineffective assistance of counsel, and on February 12, 1982, the District Court entered judgment denying the petition for a writ of habeas corpus on all claims.

Stamper appealed the denial of the petition for a writ of habeas corpus to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit, on March 4, 1982, ordered briefing and oral argument. Briefs were filed and the case was set for oral argument on October 6, 1982. Prior to oral argument, however, the Court of Appeals en-

tered an order (App. A), remanding the case to the District Court for dismissal pursuant to *Rose v. Lundy*, 50 U.S.L.W. 4272 (U.S. March 3, 1982).

A motion for stay of mandate was filed in the Court of Appeals which was denied by an order dated October 15, 1982 (App. B).

On October 25, 1982, your Petitioner filed a formal waiver of exhaustion in the District Court (App. C), and a motion for stay pending this petition for certiorari (App. D).

ARGUMENT FOR GRANTING CERTIORARI

When the original petition for a writ of habeas corpus was filed, the Petitioner had exhausted his state court remedies. The District Court sought to avoid piecemeal litigation by appointing additional counsel to investigate possible claims of ineffectiveness of counsel. When said claims were presented in an amended petition, the Court proceeded to decide the entire case over your Petitioner's objection for failure to exhaust state remedies.¹

After the plenary hearing, the state determined that the District Court had fully and fairly decided the issues and no longer pursued the defense of exhaustion when the Petitioner below appealed to the Fourth Circuit. Indeed, the state argued on brief in the Fourth Circuit that it had waived exhaustion of state court remedies. There was no cross appeal by the state or assignment of error that the District Court erred in failing to dismiss for non-exhaustion.

The exhaustion doctrine is based on comity, not jurisdiction. *Fay v. Noia*, 372 U.S. 391, 420 (1963). It exists

¹ Until *Rose v. Lundy* was decided, the rule in the Fourth Circuit was that only unexhausted claims would be dismissed. *Hewet v. North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969).

to avoid unnecessary conflicts between the state and federal court, and to avoid unnecessary litigation. *See, generally, Galtieri v. Wainwright*, 582 F.2d 348 (5th Cir. 1978). Where the state has persisted in advancing its claim that a petitioner has failed to exhaust his state court remedies, and where a federal court has granted a petitioner relief without exhaustion of state court remedies, this Court has required exhaustion of state court remedies. *Pitchess v. Davis*, 421 U.S. 482 (1975); and *Picard v. Connor*, 404 U.S. 270 (1971).

In *Rose v. Lundy*, this Court reviewed the principles behind the exhaustion requirement. The exhaustion doctrine exists to allow the state to have the first opportunity to correct federal constitutional error and minimize federal interference and disruption of state court judgments. The exhaustion requirement serves to reduce piecemeal litigation. In *Rose*, this Court said:

The exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings.

50 U.S.L.W. at 4275.

The policy reasons for requiring exhaustion are not applicable in this case. Your Petitioner believes that the Court of Appeals erred when it failed to consider the state's waiver of exhaustion.² Exhaustion of state court remedies may be waived. *See Barksdale v. Blackburn*, 670 F.2d 22, 24 (5th Cir.), *cert. denied*, — U.S. — (1982); *Collins v. Auger*, 577 F.2d 1107 (8th Cir.), *cert. denied*,

² Petitioner points to the fact that the District Court conducted a full plenary hearing, and the Court of Appeals ordered briefing and argument. These expenses should have been considered by the Court of Appeals in its failure to accept the waiver argument.

439 U.S. 1133 (1978); *Harding v. State of North Carolina*, 683 F.2d 850 (4th Cir. 1982); *Jenkins v. Fitzberger*, 440 F.2d 1188, 1189 (4th Cir. 1971); and *Van Poyck v. Wainwright*, 595 F.2d 1083 (5th Cir. 1979).

The Fourth Circuit erred when it remanded this case to the District Court when your Petitioner did not request it. The state's waiver of exhaustion should have ended this issue. In *Robinson v. Wade*, 686 F.2d 298, 303, n. 8 (5th Cir. 1982), the Court said:

Waiver of exhaustion, implied by this Court from the simple failure vigorously to assert the state remedies remain untried, . . . is certainly accepted when explicitly made. (Citations omitted).

Indeed, in *Hopkins v. Jarvis*, 648 F.2d 981, 983, n. 2 (5th Cir. 1981), the Court found a waiver of state remedies where the state had pled lack of exhaustion at the magistrate level, and failed to reassert exhaustion at the district court level:

In this case, appellee did raise lack of exhaustion in its answer to the habeas petition; once the magistrate found that appellant had exhausted state remedies, appellee did not raise exhaustion before the district court in its review of the magistrate's report and recommendation. Moreover, appellee has not mentioned exhaustion in his brief or argument before this court. We conclude, therefore, that appellee has waived the defense of lack of exhaustion.

Similarly, your Petitioner contends that its failure to raise the defense of exhaustion in the Court of Appeals amounted to a waiver of that remedy. *Cf. Wilkes v. Israel*, 627 F.2d 32, 38, n. 10 (7th Cir.), *cert. denied*, 449 U.S. 1086 (1980).

The reasons underpinning the *Rose v. Lundy* decision are not present in this case. Not only has the state been required to participate in a plenary hearing, but also it has been required to brief the issues in the Court of Appeals. The state should have the right to abandon its initial claim of exhaustion if it so desires. Indeed, in this case the state filed an explicit waiver of exhaustion in the District Court after it was remanded by the Court of Appeals.³

Exhaustion of state remedies inures to the benefit of the state; the state should be able to waive it. In a case where the state is willing to give up the right to have state remedies exhausted and does not insist on exhaustion of state remedies, exhaustion should not be required. Because none of the reasons which have traditionally required exhaustion of state remedies are present in this case, this Court should consider the state's waiver of exhaustion and look to judicial economy and require the Court of Appeals to decide this appeal. In the posture of this case, the decision of the Court of Appeals amounts to a waste of judicial economy.

³ This waiver has not yet been acted upon by the District Court.

CONCLUSION

The requirement of exhaustion of state court remedies is a benefit which inures to the state, and the Court of Appeals erred when it summarily remanded this case to the District Court for dismissal in light of *Rose v. Lundy*. Your Petitioner did not assert exhaustion of state court remedies in the Fourth Circuit and argued that it had waived state court remedies in that Court. In the interests of judicial economy, this Court should grant certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

THOMAS D. BAGWELL
Assistant Attorney General

Supreme Court Building
6th Floor
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Thomas D. Bagwell, Assistant Attorney General of Virginia, Counsel for Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the . . . day of December, I mailed a copy of the foregoing Petition for Writ of Certiorari to Gary J. Spahn, Esquire, MAYS, VALENTINE, DAVENPORT & MOORE, P. O. Box 1122, Richmond, Virginia 23208, Counsel for Respondent.

THOMAS D. BAGWELL
Assistant Attorney General

App. 1

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-6152

CHARLES SYLVESTER STAMPER,

Appellant,

VS.

ALTON BASKERVILLE,

Appellee.

Appeal from the United States Court of Appeals
for the Eastern District of Virginia.
D. Dortch Warriner, District Judge.

ORDER

The appellant was convicted on three charges of capital murder, one charge of robbery and three charges of using a firearm during commission of a felony. On August 30, 1979, the Supreme Court of Virginia found no reversible error, affirmed all seven convictions, and independently determined that the three death sentences were properly imposed. *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E. 2d 808 (1979). A writ of habeas corpus was filed in the United States District Court for the Eastern District of Virginia, Richmond Division, on January 19, 1982. The district court wisely¹ appointed separate counsel to investi-

¹ This does not indicate that the court feels that there was ineffective assistance of counsel, but only a comment on the district court's foresight to include this ground and possibly head off a later petition.

App. 2

gate possible claims of ineffective assistance of counsel at the trial stage and the state appellate state [sic]. The appointment resulted in the filing of an amended petition adding claims of ineffective assistance of counsel. This claim had never been presented to or considered by the state courts of the Commonwealth of Virginia.

On February 12, 1982, the district court entered judgment denying the amended petition for a writ of habeas corpus on all claims. *Stamper v. Baskerville*, No. 82-0025-R (February 12, 1982). On March 3, 1982, the United States Supreme Court in *Rose v. Lundy*, U.S. 50 U.S.L.W. 4272 held that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims.

It is, therefore, ordered that this matter be remanded to the district court for dismissal pursuant to *Rose v. Lundy*.

FOR THE COURT—BY DIRECTION:

WILLIAM K. SLATE, II
Clerk

App. 3

Appendix B

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 82-6152

CHARLES SYLVESTER STAMPER,

Appellant,

VERSUS

ALTON BASKERVILLE, Superintendent

Appellee.

**Appeal from the United States District Court for the
Eastern District of Virginia, at Richmond.
D. Dortch Warriner, District Judge.**

Upon consideration of a motion of the appellee, for stay
of mandate pending application to the Supreme Court of
the United States for a writ of certiorari,

IT IS ORDERED that the motion is **DENIED**.

FOR THE COURT—BY DIRECTION:

/s/ WILLIAM K. SLATE, II
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 82-0025-R

CHARLES SYLVESTER STAMPER,
Petitioner,

v.

ALTON BASKERVILLE, Superintendent,
Respondent.

WAIVER OF EXHAUSTION

Now comes the Respondent, by counsel, and states as follows:

1. The Respondent states to the Court that the Respondent waives exhaustion of state court remedies as to the Petitioner's allegations.

WHEREFORE, Respondent prays that this Court will consider the Petitioner's claims and thereafter deny and dismiss said claims.

ALTON BASKERVILLE, *Superintendent*

By: THOMAS D. BAGWELL
Counsel

App. 5

Thomas D. Bagwell
Assistant Attorney General
Supreme Court Building
6th Floor
101 North Eighth Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I certify that on this 25th day of October, 1982, a copy of the foregoing Waiver of Exhaustion was mailed to Gary J. Spahn, Esquire, MAYS, VALENTINE, DAVENPORT & MOORE, P. O. Box 1122, Richmond, Virginia 23208.

THOMAS D. BAGWELL
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

Civil Action No. 82-0025-R

CHARLES SYLVESTER STAMPER,

Petitioner,

v.

ALTON BASKERVILLE, Superintendent,

Respondent.

MOTION FOR STAY

Now comes the Respondent, by counsel, and moves this Court for a stay of decision in the above-styled matter as follows:

1. Respondent states that the United States Court of Appeals for the Fourth Circuit remanded this case to this Court by an order dated October 4, 1982, for dismissal pursuant to *Rose v. Lundy*, 455 U.S. —, 50 USLW 4272 (March 3, 1982).

2. The Respondent applied for a stay of the mandate in the United States Court of Appeals which was denied by an order dated October 14, 1982.

3. The Respondent has decided that he will petition the United States Supreme Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit. Respondent requests this Court to stay issuance of any decision until after consideration by the Supreme Court of the United States.

App. 7

WHEREFORE, for the reasons stated, the Respondent requests this Court to stay its consideration of this case until the Respondent's petition for a writ of certiorari to the United States Supreme Court can be decided.

ALTON BASKERVILLE, *Superintendent*

By: THOMAS D. BAGWELL
Counsel

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SUPREME COURT, U.S.

No. 82-988

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALTON BASKERVILLE,

Petitioner,

v.

CHARLES SYLVESTER STAMPER,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

No. _____

ALTON BASKERVILLE,

Petitioner,

v.

CHARLES SYLVESTER STAMPER,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals
for the Fourth Circuit is an unreported order; it is reproduced
in the petition as Appendix A beginning at App. 1.

STATUTE INVOLVED

28 U.S.C. § 2254 (1977) provides in relevant part:

(b) An application for a writ of habeas corpus in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

QUESTION PRESENTED

Whether, in light of this Court's decision in Rose v. Lundy, 50 U.S.L.W. 4272 (U.S. Mar. 3, 1982), the court below should have remanded this cause to the district court with direction to dismiss, where respondent's writ of habeas corpus, as amended, contained both an unexhausted and exhausted claims.

STATEMENT OF THE CASE

Respondent adopts the statement of the case appearing at pages 2 and 3 of the petition for certiorari.

REASONS FOR DENYING THE WRIT

At page 2 of its Petition, petitioner admits that respondent's habeas corpus petition, as amended, contained an unexhausted claim (ineffective assistance of counsel) as

well as exhausted claims. Accordingly, this Court's holding in Rose v. Lundy, 50 U.S.L.W. 4272 (U.S. Mar. 3, 1982), is dispositive and the circuit court below correctly remanded this cause to the district court with direction to dismiss. Indeed, this Court's recent decision in Rose could not have been more apposite to the question here in issue:

In sum, because a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss habeas petitions containing both unexhausted and exhausted claims. (emphasis added)

Id., 50 U.S.L.W. at 4276. This case comes squarely within the Rose v. Lundy rule and does not merit additional attention or consideration by this court.

Petitioner's argument that "[t]he reasons underpinning the Rose v. Lundy decision are not present in this case," is premised upon petitioner's erroneous interpretation of the exhaustion requirement as a right that "inures to the benefit of the state," and one that may be waived by the state. Petitioner's Brief for Certiorari at 4-6. This Court has never characterized the exhaustion requirement as a state right that may be waived by the state prosecutor and nothing in Rose indicates that the rule is to be applied only when urged by a state's attorney.

At the heart of the exhaustion rule is the premise that state courts should have the initial opportunity to consider state prisoners' allegations that their federal

rights have been violated. The rule seeks to prevent unnecessary conflicts between the state and federal courts. If this goal is to be accomplished, the rule cannot be avoided at the whim of the state attorney general. The preference of the state attorney general has no bearing on the comity principles that require federal courts to abstain from ruling on habeas corpus petitions containing unexhausted claims.

In summary, the rule articulated by this Court in Rose is clear, unambiguous and easily applied. It simply requires a federal district court to dismiss any state prisoner's habeas corpus petition that contains a claim giving rise to state court remedies that have not been exhausted. In this case, the petition filed by respondent in the district court below, as amended, included an unexhausted claim. In light of Rose, that petition was properly remanded by the circuit court below, with direction to dismiss.

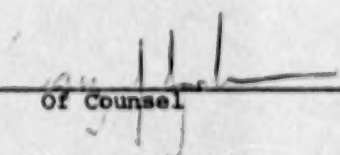
CONCLUSION

For the foregoing reasons, respondent Charles Sylvester Stamper respectfully requests this Court to deny a writ of certiorari to review the judgment of the Fourth Circuit.

Respectfully submitted,

CHARLES SYLVESTER STAMPER

By



Of Counsel

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January 13, 1983

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No. 82-928

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ALTON BASKERVILLE,

Petitioner,

v.

CHARLES SYLVESTER STAMPER,

Respondent.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Charles Sylvester Stamper, who is now held in a Commonwealth of Virginia penitentiary, asks leave to file the attached Brief In Opposition to Petition for a Writ of Certiorari and to proceed in forma pauperis pursuant to Rule 46 of the Rules of the Supreme Court of the United States. The district and circuit courts below appointed counsel to represent respondent pursuant to 18 U.S.C. § 3006A; therefore, respondent does not file a Rule 46.1 affidavit herewith.

CHARLES SYLVESTER STAMPER

By 

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